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Supreme Court of the United States

October Term, 1926.

No. 200.

FRANK MOORE, President of Odd Lot Cotton Exchange of New York,

Appellant,

—vs.—

THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH CO. and THE GOLD & STOCK TELEGRAPH CO.,

Appellees.

APPELLANT'S REPLY BRIEF.

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Supreme Court of the United States

FRANK MOORE, President of Odd Lot Cotton Exchange of New York, Appellant, —vs.— THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH CO. and THE GOLD & STOCK TELEGRAPH CO., Appellees.	No. 200. October Term, 1926.

APPELLANT'S REPLY BRIEF.

In the prolegomena of respondent's brief they undertake, among other things, on page 8, to give a history of the contract between the New York Cotton Exchange and the Western Union Telegraph Company in issue in this cause. In its narration of the history of the contract appear the fatuous claims that the purpose of the contract was entirely altruistic, and that its object was to accomplish the high moral purpose of destroying bucket shops. Considering the business in which cotton speculators are engaged this claim of altruism is, to say the least, amusing. We think it is fairly deducible from the history of exchanges, and their quotations, that the purpose of the contract was one purely of dollars and cents on the part of the Cotton Exchange, and in pursuance of

that purpose to establish a monopoly in the trade and transportation of cotton, and as we shall undertake to show, that such monopoly was completely established and carried out under the contract, in spite of, and to the financial loss of the Western Union Telegraph Company. For the purpose of our deductions we assume the facts as stated by Appellant, to be largely true but our deductions bring us to the opposite conclusion. It will be noted that while the bucket shop issue is not before this court on this appeal, it is made the woof running through the entire warp of the Appellee's brief, and as that issue looms large under every point made by the Appellees we feel that it deserves some consideration in this reply.

As stated by the Appellee, "prior to July 14, 1903, the Exchange permitted the Western Union Telegraph Company, and the Postal Telegraph Company, to collect quotations through its own employees on the floor of the Exchange and to distribute them to their customers without any restriction. The Telegraph Companies then sold the quotations to all persons desiring them for any purpose. The result was that many persons used them in conducting bucket shops. As a result the bucket shop evil assumed such large proportions that it brought discredit upon the New York Cotton Exchange and its members in the minds of many who ignorantly supposed, from the use of the Exchange's quotations as a basis of the illegal bets in the bucket shops, that the latter were in some way chargeable to the Exchange. To remedy this evil, on July 14, 1903, the Exchange withdrew its license to the Telegraph Companies to collect its quotations and distribute them indiscriminately, and adopted certain regulations to prevent the distribution of its quotations to persons conduct-

ing bucket shops. To accomplish this, the Exchange on July 14, 1903, entered into written contracts with the Western Union Telegraph Company, and Postal Telegraph Company, which, with slight modifications, are now practically the same as the contract dated April 4, 1922, which is printed as "Exhibit A" annexed to the Exchange's answer on pages 23-36 of the Record."

It will be noted that prior to July 14, 1903, the Western Union Telegraph Company was permitted to gather the quotations made on the floor of the Exchange, without charge, and to sell them to its customers; that on July 14, 1903, their right to gather the quotations free of charge, was discontinued and from said date they were compelled to pay for such quotations an annual sum of $13,800.00, payable monthly, and this annual payment was again increased in 1922 to the sum of $27,500.00 per annum, payable in monthly installments. No doubt, the Western Union Telegraph Company found this to be rather cold-blooded altruism, but they were in a situation where they were compelled to yield to the demand of the Cotton Exchange or discontinue that business. In addition to this fact it is apparent that the New York Cotton Exchange originally organized for the purpose of providing local merchants with some centralized trading place, and that at the time of such establishment the merchants had not in mind the idea that it would eventuate in the establishment of prices and quotations which would in effect control the cotton trade of the country, and considered their price quotations merely of local importance. The Western Union Telegraph Company recognized the value of these quotations to the buyers and sellers of cotton generally and therefore gathered

such quotations and sold them, the revenue from such sales continued to grow until they aroused the cupidity of the Exchange's officials, and the distributions of such quotations by the Western Union Telegraph Company had grown to such proportions that offices for trading in cotton were established and operated in the neighborhood of the New York Cotton Exchange, as well as in distant cities, and these traders competed with members of the Cotton Exchange on equal terms by reason only of having the use of the Cotton Exchange quotations.

Under these circumstances, with our knowledge of human nature, though limited, instead of attributing to the New York Cotton Exchange the purpose of destroying the bucket shops, it is fair to assume that it had in view a more selfish purpose, and particularly in view of the fact that the selfish purpose has been accomplished and carried out with a ruthless hand. The fair inference is, that the New York Cotton Exchange having discovered that these quotations had been made valuable by the exploitation of them by the Western Union Telegraph Company, determined to require the Telegraph Company to pay to the Cotton Exchange a part of the revenue realized by it, and as the business increased and revenues increased the Cotton Exchange increased the annual payments required to be made by the Telegraph Company. We think it also fairly inferable that the discredit of their quotations by reason of their use by bucket shops was not so much the inducing motive in making the contract of 1903 as it was to rid the members of the Exchange of the competitive traders who were able to compete with the members of the New York Cotton Exchange only by reason of the service and use of the Cot-

ton quotations as furnished by the Western Union Telegraph Company, with their subsidiary ticker service. This, we think, is the true reason because an examination of the contract will show that the New York Cotton Exchange under the contract reserves to itself an arbitrary veto power against the re-sale of the quotations by the Telegraph Company to any and all persons, and not merely to bucket shops.

In order to exercise the arbitrary veto power it was wholly unnecessary to mention bucket shops any more than the necessity of mentioning gambling shops, or any other places where business was conducted in violation of law. It is apparent that bucket shops were mentioned as a mere subterfuge or cover for the establishment of a monopolistic protection to the members of the New York Cotton Exchange, and to such other dealers the country over as may be selected by the New York Cotton Exchange and whose business is not competitive but an aid to the members of the New York Cotton Exchange. We have in the application of the use of these quotations by the Cotton Exchange under the contract with the Western Union Telegraph Company most conclusive evidence of the latter's purpose for entering into the contract. We feel perfectly safe in making this statement, that there is no person or organization in the United States transacting a cotton business, or engaged as brokers in cotton, who do not use, and are being served with the continuous cotton quotations of the New York Cotton Exchange, and that only such persons as are designated by the New York Cotton Exchange are engaged in, or can engage in, the business of buying, selling and shipping cotton in interstate commerce in the United States, and further that

there is no individual or association engaged in the cotton business in the City of New York, except such persons as are members of the New York Cotton Exchange and have the service and use of the continuous cotton quotations of the New York Cotton Exchange, and this monopolistic feature is the result of the New York Cotton Exchange's pretense of suppressing bucket shops and have used it effectively as a code word for "competitors", and it is the "sugar-coating" of the monopolistic pill which has induced the public to swallow it for many years.

The Appellee is laying great stress upon this bucket shop issue under the realization that it is the sole defense which it can ultimately make to the Appellant's demand for the service of these quotations. Appellant has admitted from the outset, and now admits, that if its purpose in obtaining the service of the continuous quotations is for the operation of a bucket shop then its petition must be denied, but the defense is not before the court on this appeal, as this appeal is prosecuted from two separate portions of the judgment of the Circuit Court of Appeals.

The first is, from that portion of the judgment which directs the dismissal of the Appellant's bill on the ground that it fails to state facts sufficient to show that the subject matter of its bill is within the jurisdiction of the court, and the second, from the order directing a judgment in favor of Appellees enjoining the Appellants from purloining the quotations. The appeal taken from the District Court to the Court of Appeals was from the order denying the Appellant's motion for a preliminary injunction, and from an order granting the Appellee's motion for a preliminary injunction. For the purpose of considering the Appellant's right

to a preliminary injunction, and in the exercise of the court's discretion, it was its duty to take under consideration both the bill and the answer, and on the appeal from the order refusing the writ on the ground of the court's abuse of discretion, it was necessary to bring before the Appellate Court both the bill and answer. On the consideration of the appeal by the Court of Appeals the Court treated the motion as a demurrer to the bill, which it had the right to do under the practice, and held that the injunction was properly denied because the bill failed to state facts sufficient to constitute a cause of action. In treating this motion as a demurrer the Court could look to the bill alone and was bound to accept as true all facts which were well pleaded, but could not and should not have taken into consideration any defense pleaded in the answer. The Court had the right to take into consideration the answer in passing upon the question of the Court's discretion in granting or refusing the preliminary injunction, but could not take into consideration any facts stated in the answer in considering the sufficiency of the bill. The bill does not set out any facts touching upon plaintiff's business as a bucket shop, but specifically charges that it is conducting a legitimate business of a cotton exchange, as is being conducted by the Appellee. This appeal is prosecuted from the Court's order directing a dismissal of the bill on the ground of its failure to state facts sufficient to constitute a cause of action and Federal jurisdiction. Hence, the issue of the bucket shop, on this appeal, is not before this court. The issue is merely brought into the case as a defense by the Appellees and that only "upon information and belief," and is not supported by any affidavit or allegation of fact showing the information upon

which such belief is based. The appellant denies such defense and expects on the trial to make clear and full proof that it is not now, has never been, and never expects to engage in the bucket shop business. Thus the issue as to whether appellant desires the use of the quotations in the conduct of a bucket shop business is a controverted fact upon which Appellant is entitled to a trial and the Court cannot determine this issue on a motion in the nature of a demurrer to the bill. Hence, Appellant shows, that there is no substance in the Appellee's claim that the contract between itself and the Western Union Telegraph Company was entered into solely for the high and moral purpose of preventing the operation of bucket shops, and further shows that almost the entire brief of Appellee is based upon the bucket shop issue, which is not now before this Court.

With this preliminary Appellant will endeavor to reply seriatim to the various points made in Appellee's brief.

APPELLEES' POINT 1.

THIS SUIT IS NOT SUSTAINABLE UNDER THE FEDERAL ANTI-TRUST LAWS.

Under this point the Appellee quotes Sections 1 and 2 of the Sherman Anti-trust Law and makes this statement in its brief, page 11: "The amended bill alleges no act or conduct by any of the defendants other than the execution of and compliance with the contract respecting the quotations of the Cotton Exchange, that has any semblance to a contract in restraint of trade, or to the monopoly of, or attempt to monopolize, any part of inter-state commerce, thus, as respects the Federal Statutes, the sole question here is, whether

this contract can be construed as one in restraint of interstate commerce or an attempt to monopolize any part of that commerce." The Appellee in this statement fails to recognize the fact that appellant's allegations bring the case within both Sections of the Sherman Anti-trust Act. First, it states the appropriate facts and charges the New York Cotton Exchange and the Western Union Telegraph Company, and its subsidiary, have entered into a contract under the terms of which it seeks to restrain trade in the cotton industry, as prohibited by Section 1 of the Act, and second, that the New York Cotton Exchange, by the development and use of its quotations, has established a monopoly of the cotton business, as prohibited by Section 2 of the Act. Proceeding with its argument under the point thus made appellee discusses the application of the "rule of reason", or the pragmatic legal philosophy, to the construction of the Sherman Anti-trust Law and cites the authorities on that subject with which we are all familiar, and which no one now questions.

In this connection the Appellees strongly press upon this Court a consideration of the *intention* of the parties to the contract as a governing element in its construction. We have endeavored to show hereinbefore that we do not concur with the Appellees as to their *intent* in entering into this contract, and we have endeavored further to show that their actions in establishing and maintaining a monopoly of the cotton business does not square with their protestations as to their *intent* in entering into the contract. From this it will be observed that there is a controversy of fact as to such *intentions* upon which we are entitled to a trial, and which the Court cannot rightly deny us by deciding that fact on a mere motion in the

nature of a demurrer to our bill. Then proceeding to page 16 of the brief the Appellee proceeds to discuss the allegations of the answer as to the use of quotations by bucket shops, and the intent of the Appellees in entering into the contract. This matter we have discussed and shown as we believe that this question is not now before the Court. However, in discussing the contract on page 18 of Appellee's brief, the Appellees say: "This contract does not undertake to fix the prices which the Telegraph Company must exact from those desiring the continuous or other quotations. It does fix the maximum price to be charged members of the Exchange, but does not prescribe minimum prices to anybody. The contract is, therefore, not to be condemned as within the principle established by the Supreme Court, in the cases cited." The Appellees here cite the price fixing cases, on page 19 of their brief. Referring to the cited cases Appellee further states, "which prohibit agreements made by patentees, or others, with their purchasers under which the latter agreed to resell at the prices fixed by the former. These cases are reviewed in *Boston Store vs. American Graphophone Co.*, 246 U. S. 8. The contracts condemned are those which aim to establish a price maintenance system and a permanent marketing price. The contract in the case at bar has no such purpose. Applying to it 'The rule of reason,' neither the nature, nor the character of the contract, nor the circumstances surrounding it, justify the conclusion that it is entered into for the purpose of restraining trade or of creating a monopoly, or for any purpose other than that of properly and fairly regulating the transaction of the business for which the New York Cotton Exchange was organized and of preventing the

misuse of its quotations. It is but a normal method of accomplishing a highly beneficial purpose—the prevention of the use of quotations in bucket shops. As such the contract is not within Section 1 of the Sherman Act as construed by the decisions of the Supreme Court already cited." The Appellee here fails to grasp the principle upon which the cases are decided, and narrows the principle to the facts in the cases which establish the principle. The Sherman Anti-trust Act does not condemn price fixing on re-sale of personal property but condemns "every contract * * * in restraint of trade or commerce." It is the fact that a condition of re-sale is based upon a price fixed which causes a *restraint of trade* that brings it within the condemnation of the Sherman law. It is not the "price fixing" *proprio vigore*, but it is its effect to "restrain commerce." In reviewing the cases this Court says, in *Boston Store vs. American Graphophone, supra*, "The case therefore directly involved the general question of the power of the patentee to sell and yet, under the guise of license or otherwise, to put restrictions, which in substance, were repugnant to the rights which necessarily arose from the sale, which was made." This is the general principle laid down in all of the cases. It is not merely the fact of price fixing, but it is its effect as a restriction on the right of the purchaser to re-sell his property, which brings it within the condemnation of the Sherman Anti-trust Law. This Court discussing the same question in *United States vs. Patten*, 226 U. S. 524, says, page 541: "Section 1 of the Act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as

well involuntary restraints; as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce, *or restrict the common liberty to engage therein.*"

The Anti-trust Act is sweeping, and sufficiently comprehensive in language to include in its condemnation every form of contract, or conspiracy, tending to restrain commerce, and is not limited to mere price fixing except in so far as such price fixing by contract for re-sale limits the purchaser's right of further alienation of his title, and thereby places a restraint on commerce. The contract under consideration between the New York Cotton Exchange and the Western Union Telegraph Company conveys absolute title to the quotations to the Western Union Telegraph Company but limits its right to re-sell such quotations to such persons only as may be approved by the vendor, the New York Cotton Exchange. This is such a limitation on further alienation of property actually sold, as to bring it directly within the ambit of the trust law, as defined by all of the price-fixing cases referred to and all other decisions of this Court on that subject.

Continuing its argument under this point, on page 22 of the brief, the Appellee says: "As the owner of the quotations, the Exchange is under no legal duty to sell it to any particular person nor is it under any legal obligation to sell to all because it sells to some. It has the legal right to determine to whom it will sell, and to require its Agent (The Telegraph Company) which it employs to effect sales to carry out its purpose to select its purchasers, and, in exercising this right to select those to whom it will communicate the

quotations, it does not attempt to monopolize or otherwise violate the Sherman Act or the general law." In support of this proposition Appellees cite, *Whitwell vs. Continental Tobacco Co.* 125 Fed. 454; *United States vs. Trans-Missouri Freight Association,* 166 U. S., 290, 320 (1897); *Eastern States Lumber Association vs. United States,* 234 U. S., 600, 614 (1914); *United States vs. Colgate & Co.,* 250 U. S., 300, 307, (1919). The distinction between those cases and the other price fixing cases was clearly pointed out by this Court in *United States vs. Schraders Son,* 252 U. S. 85. In the cases cited by Appellee there was no claim made under Section 2 of the Sherman Act that the parties had created, or established, a monopoly in their respective lines of business, but charged that they had entered into combinations to restrain commerce under Section 1 of the Act. It appeared from the facts that the dealers in those cases had not entered into any contract, or conspiracy, to fix resale prices, but the prices which they had submitted for re-sale were merely advisory, and admonitory, and necessarily the Court held that these dealers being engaged in a private business in the absence of a monopoly, had the right to select their customers, and to state in advance the conditions upon which it would continue to deal with such customers. Hence the proposition made by the Appellee, last referred to, and the authorities cited, have no application to the case at bar since this case is brought expressly upon a *contract,* limiting the right of the purchaser to re-sell its property and thereby restraining trade in that property. The Appellees also cite under that proposition the cases of *Bitterman vs. Louisville & Nashville R. R. Co.* 207 U. S. 205, 222 (1907); *Federal Trade Commission vs. Curtis Publication Co.,* 260 U. S. 568 (1923). These

cases have no relation to the instant case. The *Bitterman* case, *supra*, involved the question of the right of ticket scalpers to engage in the business of buying and re-selling limited Railway tickets. The Court in that case held, that while transportation contracts were property, they were a qualified property right of a personal service to the purchaser of a conditional ticket, and therefore did not come under the general provisions of the law covering the dealings in property and commodities generally. The *Curtis* case, *supra*, merely involved the question whether a dealer had the right, without violating the anti-trust laws, to employ an agent to handle his business exclusively. That was merely a question of agency and the Court held, the only logical conclusion, that every business man or trader has the right to employ agents to handle their business exclusively without violating any anti-trust or monopoly law. There is no question of agency, however, in the case at bar.

Continuing the argument under the foregoing point the Appellees say on page 24 of their brief: "But the question whether this contract is to be condemned as a restraint upon trade, or an attempt at monopoly, either under the Sherman Act, or the general law, is conclusively settled in the negative by the decision of this Court in *Board of Trade vs. Christie Co.*, 198 U. S. 236 (1905)." The only issue in the *Christie* case was as to whether the quotations of the Board of Trade were property, and whether the Courts would protect such property right against theft or other unlawful appropriations. It is true that the arguments in the case assumed a much wider scope than was nececsary to the decision of the single issue in the case, and the Court in its opinion did discuss some of the irrelevant arguments, but strictly reserved all decisions upon the points discussed except the one point that

the quotations were property, and that the Courts would protect the owner of such quotations against unlawful appropriation. The issue decided in that case effects only the Appellees cross-claim for an injunction against Appellants purloining the Appellee's quotations, but the issue in the case so decided has no bearing upon, or relation to, the issues presented by Appellant in his bill in the instant case.

We should not give that case any extended consideration except for the fact that the Appellees so earnestly stress the decision in that case, and press it upon this Court as *conclusively* settling the issues raised by plaintiff's bill. By referring to the subsequent cases, which we have cited in our brief, the *Christie* case has been limited to the facts of that case. That was scarcely necessary as this Court had itself made such limitation in the opinion on that case. In the opinion in the *Christie* case, this Court says: "The defendants lay hold of the declaration in the case last cited, (*New York & C. Grain & Stock Exchange vs. Board of Trade*, 127 Ill. 153) and say, with doubtful consistency, that this information is of sufficient importance that it is clothed with a public use, and that therefore, they are entitled to get and use it. In the case referred to it was held, that the plaintiff, which had been receiving the continuous quotations was entitled still to receive them on paying for them, and submitting to all reasonable requirements in relation to the same. Perhaps the right of the plaintiff would have been more obvious if it had demanded an opportunity on reasonable conditions of collecting the information for itself, especially if the legislature had seen fit to provide by law for its doing so. But it is not necessary to consider whether we are bound by that decision, or, if not, should follow it *since in these cases the claim is*

not qualified by the submission to reasonable rules, or any offer of payment. It is a claim of independent rights and a denial that plaintiff has any right at all." In the instant case the appellant merely contends that under all of the circumstances the Western Union Telegraph Company is bound to furnish him with the quotations upon his offer to sign the usual application and enter into the usual form of agreement and to pay the usual price for such service. Appellant does not deny the Appellees property right in the quotations, as was done in the *Christie* case, and comes strictly within the reservation made by the opinion of the Court in the *Christie* case last referred to.

Proceeding further in the opinion in the *Christie* case this Court says: "Finally it is argued that the contracts with the Telegraph Companies violate the Act of July 2, 1890. The short answer is, *that the contracts are not relied on as a cause of action.*" In the instant case on the contrary Applicant's cause of action is based specifically upon the contract between the New York Cotton Exchange and the Western Union Telegraph Company (See among others Sec. 21 of the Bill R. 5). Continuing the opinion in the *Christie* case this Court further says: "It is argued that the true purpose is to exclude all persona who do not deal through members of the Board of Trade. Whether there is anything in the law to hinder such regulations being made with that intent we will not consider, *as we do not regard such a general scheme as shown by the contract or proved.*" In the instant case appellants specifically set out the facts of the genesis of the quotations on the New York Cotton Exchange, and in Section 25 of the Bill (R 6 & 7) show fully the method of controlling the cotton trade by the Exchange, and its members, forming a complete monopoly of the business, and the effect of

monopolizing such cotton business by the New York Cotton Exchange, and its members, is fully charged in Section 29 to and including Sec. 31 of the Bill (R. 9). Thus Appellant contends, and shows that none of the issues made in this case by the Appellant's bill are involved in the *Christie* case, and while the argument in that case took a wide range, and did cover some of the issues, this Court was careful to call attention to the fact that none of those issues were in fact involved and therefore reserved its opinion upon such issues.

Proceeding further with the argument under its First Point, the Appellee says, on page 25 of its brief, "The contract here thus being neither an attempt at monopoly nor a contract in restraint of trade, it remains to consider whether on any other principle of law, the plaintiff is entitled to the quotations belonging to the Appellee. If, so, it must be either: (1) Because the quotations have become legally impressed with a 'Public use' to that extent that, if distributed at all, they must be distributed without discrimination, except to bucket shops." Following this proposition Appellee argues that merely because a business has grown large, and became influential, it did not become impressed with a public use, as a public utility, or a public service corporation.

And Appellee cites authorities on the proposition that it was a matter for the legislative Department to determine when a private business has become of sufficient importance to effect the public interests, and should therefore be submitted to regulations, but that the judiciary could not undertake such regulations without legislative authority. this proposition we do not challenge, nor do we contend that the appellant is entitled to the quotations because business of the Cotton Exchange has grown large, and influential, in the cotton business. We

confine our claim strictly to the legislative enactment under the Sherman Act of, 1st, prohibiting contracts, combinations, and conspiracies, in restraint of trade, and 2nd, prohibiting monopolies in trade. So we deem it unnecessary to discuss Appellee's authorities under this proposition.

Under this proposition the Appellee also discusses the *Express* cases and the cases following presenting the same issue. These cases have no bearing upon the issues in the instant case. The Appellee takes the position that a public service corporation may engage in certain activities, which are not a part of its charter obligations, and hence, the Western Union Telegraph Company when engaged in the sale and distribution of stock quotations did not become liable therein as a part of its charter business. The fallacy of this position lies in the premiss. In the *Express* and *Cab* cases the Railway Companies did not engage in the express or cab business, but merely employed them as *agencies* in conducting the business of the transportation of freight and passengers under their charters. This Court held, that so long as the travelling public made no complaint of this service the Railway had the right to select its own agencies for carrying out its charter obligations. This is to say, that instead of itself carrying express matter it could employ an agent or an Express Company to do it for them, and that they were not bound to employ everybody who sought such agency. Just as the Company had the right to purchase its cars from any manufacturer it saw fit and was not bound to buy cars from all manufacturers who offered them. These principles do not apply to the instant case, because the transmission and sale of quotations is not merely an instrumentality or an agency employed by it for the purpose of conducting its charter business of transmitting messages for pay, but in

this case it is an extension of its ordinary business under the charter to additional business, which is also contemplated by its charter, and becomes one of its charter obligations to serve all persons alike to the extent of its capacity. Being a public service corporation it cannot by the use of its wires over public streets, alleys and roads conduct a private business. If it cannot acquire the quotations in a way to serve all persons alike then they must not acquire them at all, and must not undertake to conduct a private business under its charter. A sample illustration of the rule would be to take a water company acquiring a franchise to operate a water works plant in a city and after occupying the streets of the city with its pipes and connections should purchase its water supply on condition that it would re-sell the water to such persons only as the vendor of the water would approve; that the water company would not be permitted to conduct its business under any such arrangement needs no argument, nor comment, and yet that is the position which the Appellee takes here.

Further arguing this proposition, the Appellee says on page 30 of its brief: "If the Exchange is the distributor of the quotations through the agency of the Telegraph Company, a negative answer would seem to be unavoidable; for any other rule would make the news of Associations like the Associated Press and even private messages, open to all, which is at variance with the decisions." On this proposition Appellee cites the *Associated Press* cases, which have no resemblance to the case at bar. They are in no sense cognate cases. They do not deal with a commodity transmitted by interstate commerce nor are they in any respect instrumentalities of interstate commerce.

Appellee then further proceeds on this proposition, as follows: "It is argued that by its con-

tract with the Exchange the Telegraph Company acquired by purchase an *unlimited* ownership in the quotations, and that being thus possessed in its public capacity the rule that common carriers must serve all alike applies to the distribution of quotations. This position is erroneous because the Telegraph Company under this contract acquires, if any interest only a restricted one—a right to sell to certain designated persons; and when it has done this its entire interest in the quotations is gone." The fallacy of this proposition again lies in the premiss. The Appellee here assumes that the Telegraph Company acquires only a *restricted interest or title* to the quotations. When we refer to the plaintiff's bill we find the facts stated, in Paragraph 23 (R. 5), that the Western Union Telegraph Company and the New York Cotton Exchange have entered into a contract whereby the New York Cotton Exchange gives to the Western Union Telegraph Company, and the Gold & Stock Telegraph Company, the whole and exclusive right to disseminate the continuous cotton market quotations, and by referring to the contract itself it will be found, in Sec. 5 thereof (R. 32), that the Western Union Telegraph Company shall pay to the New York Cotton Exchange the sum of $27,500 00 per annum for the privilege of receiving and serving such continuous quotations, and it is further provided, in the 2nd Section of said contract, that the said Telegraph Company shall have the right for its own use and benefit to sell such quotations to any and all persons whose applications for the service of such quotations shall be submitted to, and approved of by, the New York Cotton Exchange. Such approval being the sole limitation upon the right of the Telegraph Company to sell such quotations for its own use and benefit, the Exchange having no interest whatsoever in

the proceeds of such sales. The Appellee takes the position that it does not acquire complete title to or ownership of these quotations, and that therefore it merely becomes an agent for the distribution of such quotations. The Appellee here falls into the same error that the Court did in the *Renville* case 46 App. Div. 37, and that the Circuit Court of Appeals fell into in its opinion dismissing Appellant's bill in this case. In the *Renville* case *supra,* the Court held, that under a contract similar to the one here complained of, the Telegraph Company merely occupied the position of an agent for the Stock Exchange. The Court in that case significantly remarked, however, that if the Telegraph Company had acquired the ownership of the quotations a different question would have been presented. The fact is, that the Telegraph Company did acquire full and complete title to these quotations subject only to the veto power of the New York Cotton Exchange, its vendor, of resale to any persons except such as had been previously approved by the Exchange. If the Contract had merely provided, against a resale to bucket shops or to persons intending to make unlawful use of such quotations, no criticism could have been made of the contract but the question of re-sale to bucket shops, as we have heretofore pointed out, was a mere subterfuge. The contract goes further and provides in terms that all persons desiring the service of these quotations must make application in writing to the Telegraph Company, and the Telegraph Company must submit such application to the Cotton Exchange, and that such application should not become effective until it had been approved by the Cotton Exchange. It does not make a rejection conditional upon finding the proposed applicant objectionable for any reason, but the Cotton Exchange had the right under the contract to

exercise its rejection capriciously, or whimsically, and if after an application had been approved, and the quotations being served, the Cotton Exchange had the right arbitrarily to order such service discontinued. This reservation in nowise affected the title to the quotations, because the Exchange had reserved no right in the quotations themselves. That is to say, no right to resell, and no interest of any kind in the proceeds of the resale. Thus the condition *did not restrict the title but was a mere restraint upon their further alienation*, and in all of the cases, which this Court has had before it, in price fixing and otherwise this Court has summed up the issue in short, terse language, in *Straus vs. Victor Talking Machine*, as follows: "Courts would be perversely blind if they failed to look through such an attempt as this license notice, this plainly is to sell property for a full price, and yet to place restraints upon its further alienation, such as have been hateful to the law from Lord Cokes day to ours, because obnoxious to the public interest." This summing up appears to Appellant so clear, simple and conclusive that it needs no further argument. Appellee under this same point makes the contention that it is not engaging in the sale of these quotations in its capacity as a public service corporation, but as a private activity, as they would be buying and selling news. We are not prepared to go as far as the Appellee does on this question that it may use its public instrumentalities of wires and poles on the public streets and alleys and highways to conduct a private business in the purchase, transmission and sale of news. However, that question does not enter here, as conducting a ticker service for the sale of quotations, which control and effect interstate commerce, and therefore instrumentalities of interstate commerce, comes strictly within the charter business and obligations

of a Telegraph Company. On this proposition we have cited the authorities in our original brief on page 63 to 65, and do not deem it necessary to repeat them here.

APPELLEES' POINT 2.

THE TRANSACTIONS ON WHICH THE AMENDED BILL IS BASED DO NOT INVOLVE INTERSTATE COMMERCE.

Under this point the Appellee makes the following propositions.

"(a) Such contracts are made in the board room of the Exchange and provide that the cotton is deliverable from licensed warehouses in the port of New York. Performance of the contract in the month when the cotton is deliverable must be made by the delivery of negotiable warehouse receipts issued by licensed warehouses in the port of New York. There is no obligation to make delivery at any place except in that port." This is so obviously begging the question that it scarcely needs any comment. The bill in this suit is not based on any transaction or any number of transactions conducted on the floor of the New York Cotton Exchange. What the bill does contend is, that by reason of the transactions conducted on the floor of the New York Cotton Exchange a new property is created. That is to say, a price quotation. These price quotations are the result of a large number of factors which through information have been gathered in the United States and Europe and centered in the Cotton Exchange. The bill alleges that this concentrated product, the quotation, immediately becomes an instrumentality of interstate commerce with the inherent potentiality of initiating all purchases

and sales of cotton in interstate transactions, and to initiate the interstate transportation of cotton in pursuance to such purchases and sales. This issue goes far beyond the limited question discussed by appellee as to the local transactions and are discussed by this Court in the authorities cited by the Appellee on pages 34 to 37 in its brief. We recognize the rule that a contract entered into in a State and to be completed within that State does not constitute interstate commerce, nor so affect interstate commerce as to vest in the Federal Courts jurisdiction over controversies involving such contracts, but we have here an entirely different question. Section 25 of the bill, among others, (R., 6 & 7), charges that these quotations, by long established custom, completely control the purchase, sale and transportation of cotton in interstate commerce. That no person can engage in such business without being licensed by the New York Cotton Exchange, through the service of these quotations; that these quotations are an instrumentality of interstate commerce which completely dominates the cotton business; that it is through the service of or refusal to serve such quotations that the New York Cotton Exchange has established its complete monopoly of the business; that by the use of these quotations it completely monopolizes the business in New York City by limiting the service of the quotations to its own members, and refusing the service thereof to any individuals in the various parts of the United States where cotton is dealt in, and that it restricts such licensed quotations to the particular individuals selected by them, and refuses the quotations to all other persons, so that no one can engage in the cotton business in any part of the United States unless he be so licensed by the Exchange's quotations; that by the use of such quo-

tations the Cotton Exchange has a complete monopoly and controls, and dominates, the cotton business; that by refusing the quotations to others than their special licensees, they have destroyed all competition and restrain the free flow of cotton in interstate commerce. The bill also states that the Appellant has undertaken to carry on the business of dealing in cotton in interstate commerce, and has applied to the Western Union Telegraph Company for the service of the quotations offering to comply with all the conditions imposed on such applicants and to pay the usual price therefor, but that such application was refused on the ground that the New York Cotton Exchange had refused to approve the application and that therefore the Appellant is deprived of transacting a cotton business in interstate commerce. That for the purpose of conducting such business these quotations and the Western Union Telegraph lines are absolutely necessary, and the Appellee the New York Cotton Exchange admits that the Appellant cannot conduct such business without the service of these quotations (R., 15, paragraph Eight of Appellees' answer), and that it, upon the refusal of the Cotton Exchange, has declined to serve such quotations, and hence, that no person can conduct such business except it obtains the license of the New York Cotton Exchange by use of its quotations. It seems puerile to argue that these quotations are matters of local import, and do not directly affect interstate commerce. They are not a commodity which is contracted for, with the hope of being shipped in interstate commerce, but are the very instrumentality by which interstate commerce is to be originated, and conducted, and therefore may be said to be interstate commerce itself.

APPELLEES' POINT 3.

THE CIRCUIT COURT OF APPEALS HAD JURISDICTION TO ENTERTAIN APPELLEES' COUNTERCLAIM AND TO GRANT A FINAL INJUNCTION THEREON.

Under this point the Appellees assert that both the amended bill and the counterclaim relate to the same subject matter. The Appellees do not contend that its counterclaim comes within the 2nd subdivision of equity rule 30, that a defendant may counterclaim any cause of action, which would be the subject matter of an independent suit in equity. Being limited in its counterclaim to the subject matter of the suit, the question arises what is the subject matter of the suit as set out in the bill? This question we have fully discussed in our original brief beginning at page 68, but as Appellee stresses its position of jurisdiction, and discusses the fundamental equity jurisdiction, we will again call attention to Equity Rule 30, which provides: "The answer must state, in short and simple form, any counterclaim arising out of the transaction, which is the subject matter of the suit, * * *." It will be noted that the counterclaim must arise out of a *transaction,* and not merely a tort. It must be evident that one tort cannot be offset, or counterclaim, against another tort. Appellant's bill charges that the Appellee is guilty of a tort in its failure and refusal to serve Appellant with the continuous quotations of the New York Cotton Exchange under the Sherman Anti-trust Law. The Appellee joins issue with Appellant on the allegations of the bill, and then presents a specific counterclaim against the Appellant on the ground that the Appellant is guilty of a tort, because of its purloining Appel-

lees' quotations without right and without consent of the Appellees. Neither of these claims arise out of a *transaction*. These claims are not cognate, and the grant of one in nowise affects or precludes the grant of the other. The appellant may be granted the relief by injunction against the appellees' refusal to furnish the quotations to appellant under proper conditions of compensation, etc., and at the same time without conflict may grant the Appellees an injunction against apellants purloining such quotations, or, without any conflict whatever, may grant the injunction to one and refuse the other. The two causes of action are wholly unrelated and do not cover the same transaction, except in so far that both suits relate to "torts," and it must be kept in mind that the quotations are not the subject matter of the suit, but that the subject matter of the suits of both Appellant and Appellee are the torts for which the suits are brought.

APPELLEES' POINT 4.

REPLYING TO ARGUMENTS IN APPELLANT'S BRIEF.

Under this point the Appellees make a number of propositions which deserve some consideration. The first is, that "the Circuit Court of Appeals had the right to regard the whole record before it in finally disposing of this case." "Appellant argues at page 40 of his brief, that in arriving at its decision to dismiss the amended bill the Circuit Court of Appeals erred in considering any facts alleged in the answer, that it should have considered only the allegations of the amended bill. No such error was specifically assigned by appellant and this question is, therefore, not properly before

this Court." Under this proposition the Appellee argues "that the Circuit Court of Appeals had before it the whole record consisting of the amended bill of complaint, the answers, the reply and certain affidavits. It was called upon to determine two questions: 1st, Was Appellant entitled to a preliminary mandatory injunction directing Appellees to furnish him with the continuous quotations? 2nd, Was Appellee, the New York Cotton Exchange, entitled to an injunction prohibiting Appellant from receiving or using the same quotations? If it determined the latter question in favor of Appellees, it must necessarily have passed upon the first question adversely to appellant, because it could not have decided that appellant should be enjoined from receiving the quotations except on the theory that he was not entitled to them. In determining Appellee's right to an injunction the Circuit Court of Appeals had the right to examine the allegations of the answer and the supporting affidavits and had to determine on these whether appellant was entitled to receive the quotations. It seems anomalous to argue that the Court could look to the answer in determining one motion for an injunction which necessarily decided the other motion and yet could not consider the same papers in denying Appellant's motion and dismissing the bill. The record does not present the simple case of a motion to dismiss on Appellant's amended bill of complaint alone, but one in all its essential features like a case submitted on bill and answer where all the pleadings are before the Court for its final disposition of the issues. If the Circuit Court of Appeals treated the case as one submitted on bill, answer and reply and Appellant seeks to reverse its decision on the theory that it should not have so treated it,

then he should have assigned this method of dealing with the case as error. But the record contains no such assignment of error."

This proposition for consideration must be subdivided into two classes: 1st, the proposition that no error was assigned to the action of the Court in considering the answer on the dismissal of the bill; and 2nd, the treatment of the case in the Circuit Court of Appeals as upon bill and answer. By referring to the errors assigned it will be found that Appellant assigns as the first error complained of, the following: "The Court erred in holding that the facts stated in the amended bill of complaint failed to show that the subject matter of the suit affects or involves interstate commerce or present any Federal question under the Federal Anti-trust laws or otherwise sufficient to give the trial Court jurisdiction of the suit, and for that reason dismissing complainant's amended bill." This assignment of error is certainly broad enough to present the question specifically complained of. It was not necessary and in fact would have been highly improper to embody in the assignment itself an argument of the reasons why the Court so erred, and a statement of the process of ratiocination by which the Court reached the erroneous conclusion complained of. Those are all matters proper for propositions and arguments under the assignment of error itself, but not proper for inclusion in the assignment of error.

The second proposition or rather subdivision of Appellee's point is, that on the motion for a preliminary injunction, both the trial and the appellate court, had a right to consider both the bill and answer on both questions of discretion to grant or refuse the injunction, and in their treatment of the motion as a demurrer to the sufficiency

of the bill itself. Following out the Appellee's proposition to its logical conclusion the result would be, that the plaintiff filed his bill for relief praying for an injunction against the defendant, and upon such bill made a motion for a temporary injunction. The defendant replies to the bill denying plaintiff's allegation of fact and all equities of the bill. Upon this motion for injunction the Court has the right to search the plaintiff's bill to ascertain whether plaintiff has stated any cause of action at all. On that investigation the Court cannot take into consideration any facts set up in the answer but must look to the facts stated in the bill alone and must assume conclusively that all facts well pleaded in the bill are true, and if the Court concludes that the facts so pleaded are not sufficient to constitute a cause of action the Court then, without proceeding further, and without in anywise taking into consideration the answer, must dismiss the bill and thus deny the motion for the injunction. If the Court, however, finds the bill sufficient, to constitute a cause of action then for the first time the Court may look to the answer to ascertain whether the answer denies the equities of the bill, and if so, whether the Court in its discretion should grant or refuse the motion of the plaintiff for a preliminary writ of injunction. This, as we understand, is the thoroughly established practice. If, on the other hand, the Court on a motion for a preliminary injunction, in considering the sufficiency of the bill to constitute a cause of action (should be permitted), to examine the facts stated in the answer as on a submission on bill and answer, and assume the facts stated in the answer to be true, and decided the issue of fact in favor of the defendant, and thereupon dismiss the bill, plaintiff

would be deprived of the right of trial on the controverted issues, and have a final decree rendered against him, on the mere assumption of the truth of the facts stated in defendant's answer. In the instant case, the fallacy and injustice of such a rule is demonstrated by the fact, that the plaintiff seeks to compel the defendant to serve the plaintiff with its continuous cotton quotations. The defendant answers by charging that the plaintiff is not entitled to the quotations because it is engaged in the unlawful occupation of a bucket shop business. Plaintiff admits the legal conclusion that if it is engaged in the bucket shop business and desires to use such quotations in the conduct of that business then it is not entitled to the service of such quotations, but he denies the fact that he is, or intends to, engage in such occupation; thus creating an issue of fact on the motion for the preliminary injunction, the Court, without affording the plaintiff any trial or opportunity to be heard, decides that issue of fact in favor of the defendant and dismisses the bill. It is true that if plaintiff had submitted the case on bill and answer, plaintiff would thereby have waived all right of trial, and admitted the truth of all facts well pleaded by the defendant, and the Court upon such admission could then have decided the case on its merits, and dismissed the bill, but no such proceeding was even intimated by the plaintiff in this case, and the only procedure taken was the submission of a motion for a preliminary injunction, and if on that motion alone the Circuit Court of Appeals decided that the facts stated in the answer constituted a good defense to the plaintiff's bill, and therefore the bill should be dismissed, this of course, was erroneous, and deprived appellant of his right to a

hearing and a trial of the controverted facts presented by the bill and answer.

The appellee makes the further argument under this point, that the granting of defendant's injunction was necessarily a denial of the plaintiff's injunction, and was conclusive of the case. We have heretofore undertaken to show that the two applications for injunctions by the Appellant and Appellee respectively did not refer to the same subject matter, were wholly unrelated and not conflicting, and therefore the granting or refusal of the one injunction could have no effect upon the granting or refusal of the other injunction. Under this proposition the Appellee further argues that it was the intention of the parties to treat this case as a submission on bill and answer, because after the order of the Circuit Court of Appeals dismissing the plaintiff's bill, and for the purpose of obtaining a final order on the counterclaim so that the whole case might be appealed at once, the appellant consented that the Court of Appeals might consider the defendant's affidavits on the counterclaim and make such order as the Court of Appeals might deem proper in its opinion. The appellee, with doubtful candor, contends that this was intended as a submission of the case on bill and answer. This is certainly a most far fetched conclusion and without any possible justification.

The decision of the Circuit Court of Appeals had already been rendered on December 21, 1923, when the stipulation was entered into (R., 69), and upon this stipulation the final order was entered on January 9, 1924 (R., 70). After the Circuit Court of Appeals had rendered its decision ordering a dismissal of the complaint, and affirming the decision of the lower Court granting Appellees an injunction against Appellant, the de-

cision was final as to plaintiff's case, but left the counterclaim for injunction yet to be tried on the facts, which might later involve a separate appeal, and as the counterclaim involves the question of jurisdiction the respective solicitors for Appellant and Appellee entered into the stipulation solely as to the counterclaim as stated (R., 70) in order that this appeal might cover both actions. How eminent counsel for Appellee should even seek to warp this stipulation into meaning other than what it says is quite beyond our understanding.

Our brief on page 40 states that the "bill was directed to be dismissed * * * on motion for preliminary injunction and therefore must be treated as if it had been stricken out on motion for want of equity or failure to state facts sufficient to show that a question of Interstate Commerce was involved, and for the purpose of considering the sufficiency of the bill, all of its allegations must be taken to be true without regard to any defensive matter set up in the answer." Then our brief on same page complains that the learned Circuit Court of Appeals considered the answer in passing upon the sufficiency of Appellant's bill.

The remaining propositions under this point we have already fully discussed and do not deem it necessary to give them any further consideration.

WHEREFORE the appellant again prays that the order of the Circuit Court of Appeals directing the dismissal of plaintiff's bill be reversed, and that the order granting the Appellee's injunction be reversed with directions to dismiss the Appellee's counterclaim.

JOHN M. COLEMAN,
Solicitor for Appellant
Frank Moore, President,
Odd Lot Cotton Exchange.

OSCAR B. BERGSTROM,
Of Counsel.

FEB 27 1925
CLERK

No. for October Term, 1925

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Supreme Court of the United States

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FRANK MOORE, President of the ODD-LOT COTTON EXCHANGE OF NEW YORK,

Complainant,

against

NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH COMPANY and THE GOLD AND STOCK TELEGRAPH COMPANY,

Defendants.

PAPERS IN OPPOSITION TO MOTION FOR STAY OF INJUNCTION PENDING APPEAL.

HENRY W. TAFT,
Counsel for Appellee,
New York Cotton Exchange,
40 Wall Street,
New York City.

PRINTED IN U. S. A. BY INGLE, INC., 206 FULTON STREET, NEW YORK CITY.

Supreme Court of the United States

FRANK MOORE, President of the Odd-Lot Cotton Exchange of New York,
Complainant,
against
NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH COMPANY and the GOLD AND STOCK TELEGRAPH COMPANY,
Defendants.

Affidavit in Opposition to Motion for Stay.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.:

FRANCIS DEAN, being duly sworn, deposes and says:

I am an attorney and counsellor at law in the office of Cadwalader, Wickersham & Taft, solicitors for the defendant-appellee, New York Cotton Exchange, and am familiar with all of the proceedings heretofore had in this suit.

This is a motion by the complainant-appellant for (1) an order to withhold the mandate of the Circuit Court of Appeals for the Second Circuit on the affirmance of a decree of the United States District Court for the Southern District of New York and to suspend the enforcement of the injunction therein granted against the appellant; and (2) an order to advance the hearing of the cause in accordance with Rule 32 of this Court.

The defendants-appellees do not oppose an order advancing the hearing of the appeal herein. Complainant brought this suit for an injunction requiring the defendants-appellees to furnish him and the Odd-Lot Cotton Exchange with the continuous quotations of the prices

of cotton of the defendant-appellee, the New York Cotton Exchange. The defendants, in their answer to the amended bill of complaint, asked for an injunction restraining the complainant from purloining and receiving the quotations of the defendant, the New York Cotton Exchange.

The United States District Court for the Southern District of New York, Judge Learned Hand presiding, granted an interlocutory injunction in favor of the defendants-appellees and against the complainant-appellant on March 26, 1923, and denied complainant-appellant's motion for a preliminary injunction. Judge Hand allowed complainant-appellant's petition for appeal on April 16, 1923 and provided that the order granting an injunction to the defendants be stayed upon appellant giving a bond in the sum of Five thousand Dollars ($5,000.), "said stay to continue until said appeal is heard and determined".

A copy of the order marked "Exhibit A", is annexed hereto and made a part of this opposing affidavit, and a copy of the opinion of Judge Hand, marked "Exhibit B", is hereto annexed and made a part of this affidavit.

Complainant-appellant prosecuted his appeal in the Circuit Court of Appeals for the Second Circuit. The said Circuit Court of Appeals made an order on December 21, 1923 affirming the order of the District Court and directing the District Court to dismiss the complainant's amended bill.

On January 9, 1924 the Circuit Court of Appeals for the Second Circuit entered a further order on stipulation of all parties which decreed as follows:

> "That the order appealed from which denied complainant's motion and granted defendants a preliminary injunction, be and hereby is affirmed with costs.
>
> "It is further ordered that the District Court enter a final decree dismissing complainant's amended bill of complaint with costs and awarding to the defendants a final injunction to the same

effect as the preliminary injunction in the order appealed from.

"It is further ordered that a mandate issue accordingly."

A copy of the opinion of the C. C. A., marked Ex. C, is hereto annexed.

On January 23, 1924, Mr. Coleman, solicitor for the complainant-appellant appeared before Honorable Henry W. Rogers, the presiding judge of the Circuit Court of Appeals for the Second Circuit, and applied to him for a stay of the mandate of the Circuit Court of Appeals pending an appeal to this Honorable Court. Messrs. Henry W. Taft and George Coggill, members of the firm of Cadwalader, Wickersham & Taft, solicitors for the defendant-appellee, the New York Cotton Exchange, appeared before Judge Rogers in opposition to the application.

Judge Rogers granted the petition for appeal, fixed the bond for costs on appeal in the sum of One Thousand Dollars ($1,000) and denied the petition for supersedeas. Judge Rogers' memorandum granting the petition for appeal was as follows:

"Appeal allowed and bond to cover costs fixed in the sum of One thousand Dollars ($1,000), conditioned as the law directs to be executed by a surety company and approved by one of the Judges of this Court. *Petition for supersedeas is denied.*

HENRY WADE ROGERS,
U. S. Circuit Judge."

Judge Rogers informed Mr. Coleman that he might, if he pleased, make an application to a Justice of this Honorable Court for a stay of the mandate pending the termination of the appeal by this honorable court and that he would request the clerk to withhold the mandate until Mr. Coleman had an opportunity to make such application.

On February 21, 1924, Mr. Coleman and deponent appeared before Honorable Louis D. Brandeis, one of the

Justices of this court in his apartment in Washington, D. C. Mr. Coleman made an application for a stay and Justice Brandeis stated that he would not grant a stay but that the complainant-appellant might apply to the full court for a stay.

Almost a year has elapsed since the complainant-appellant made the application to Justice Brandeis. The complainant-appellant took no steps to make the present motion until January 31, 1925. Furthermore, the complainant-appellant has not printed the record on appeal in this court. The mandate of the Circuit Court of Appeals for the Second Circuit was filed in the United States District Court for the Southern District of New York on January 13, 1925 and it is, therefore, impossible for this court to grant an order withholding the mandate of the Circuit Court of Appeals.

It is respectfully submitted that this court should not grant an order suspending the enforcement of the injunction granted herein for the reasons set forth above and for the further reason that there is no merit in the present application, as will appear from the opinion of the United States District Court for the Southern District of New York and the opinion of the Circuit Court of Appeals for the Second Circuit and from the denial of a stay by Judge Rogers.

WHEREFORE, deponent prays that the motion of the complainant-appellant for a stay be denied.

FRANCIS DEAN.

Sworn to before me this 11th day of February, 1925.

FREDERICK T. FROST,
Notary Public, Kings Co. No. 33
[SEAL] Kings Co. Register's No. 6033
Certificate filed N. Y. Co. No. 60
N. Y. Co. Register's No. 6115
Commission expires Mar. 30 1926

Exhibit "A".

(Judge Hand's Order)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FRANK MOORE, President of Odd-Lot Cotton Exchange of New York, *Complainant,* *against* THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH COMPANY and GOLD AND STOCK TELEGRAPH COMPANY, *Defendants.*	In Equity No. 26—9.

This cause came on to be heard at this Term and was argued by John M. Coleman, of counsel for the complainant, and Henry W. Taft and Henry S. Robbins, of counsel for the defendants, and it appearing that complainant has made a motion for a preliminary injunction restraining defendants from refusing to furnish to complainant and the members of the Odd-Lot Cotton Exchange of New York the continuous cotton quotations of the New York Cotton Exchange, and defendants have made a motion for a preliminary injunction, as prayed for in their answers and counterclaims, enjoining complainant or the members, officers and agents, of the Odd-Lot Cotton Exchange of New York from receiving, using or distributing the said continuous quotations of the New York Cotton Exchange, and it appearing to the satisfaction of the court that complainant and the members of the said

Odd-Lot Cotton Exchange of New York are now either purloining said continuous quotations of The New York Cotton Exchange or receiving them from some person who is purloining them and giving the same to complainant and the members of said Odd-Lot Cotton Exchange without the permission of the defendant, the New York Cotton Exchange, and that said unauthorized receipt and use of said quotations by complainant and the members of said Odd-Lot Cotton Exchange will seriously and irreparably impair the value of said continuous quotations of the New York Cotton Exchange and defeat the efforts of said Exchange to prevent the use of said quotations in bucket shops, and will materially and irreparably impair the right of said New York Cotton Exchange to derive a revenue from the distribution of said quotations unless said unauthorized receipt and use thereof is enjoined, and thereupon, upon consideration thereof, it was

ORDEDED, ADJUDGED AND DECREED as follows:

FIRST: That complainant's motion for a preliminary injunction be and the same is hereby in all respects denied.

SECOND: That defendants' motion for a preliminary injunction be and the same is hereby in all respects granted, and that complainant and each and every of the officers, members, agents, employees and servants of the Odd-Lot Cotton Exchange of New York be and they hereby are enjoined and restrained from receiving, using, selling or distributing, directly or indirectly, the continuous quotations of New York Cotton Exchange (meaning thereby all quotations wherein the price of cotton shall be quoted oftener than at intervals of fifteen minutes) or any of them, and from having, maintaining or permitting telegraph or other wires running into or through complainant's office or Exchange, over which said continuous quotations, or any of them, are passing,

and complainant and the members of said Odd-Lot Exchange of New York be and hereby are restrained and enjoined from aiding, abetting or assisting, directly or indirectly, any member of said Odd-Lot Cotton Exchange, or any other person, firm or corporation in using, selling or distributing said continuous quotations, or any of them, until it, he or they shall have first lawfully acquired the right to receive quotations, either by contract or purchase, from the New York Cotton Exchange, or with its consent and approval, from one of the Telegraph Companies authorized by it to distribute such quotations, and it is further

ORDERED, ADJUDGED AND DECREED that the defendants file an undertaking in the penal sum of Thirty thousand dollars ($30,000.), with a surety to be approved by the Clerk of this Court, conditioned upon the payment of such costs and damages to the complainant as may be suffered by him if he be found to have been wrongfully enjoined or restrained hereby.

Dated, New York, March 26, 1923.

LEARNED HAND,
United States District Court.

Exhibit "B".

(Judge Hand's Opinion)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FRANK MOORE, President of the Odd-Lot Cotton Exchange of New York, *Complainant,* *against* NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH COMPANY and the GOLD AND STOCK TELEGRAPH COMPANY, *Defendants.*	E 26—9.

Motion for preliminary injunction upon a counterclaim in equity. The plaintiff opposes on the ground that the counterclaim is not within the jurisdiction of the District Court.

The bill is under the Anti-Trust laws. It alleges that the three defendants by contract in restraint of trade have refused the plaintiff "quotations" of cotton sales on the New York Cotton Exchange, by which alone the plaintiff can conduct its business of selling "odd-lots" of cotton bales, i. e., lots of less than one hundred bales. Such quotations are necessary to the conduct of the plaintiff's business since they represent the transactions taking place on the New York Cotton Exchange which fixes the market everywhere. The defendants furnish such quotations to all persons of whom they approve and deny

the plaintiff that right in an effort to suppress competition.

The answer denies the purpose to suppress competition, but admits that the defendants have refused to give the quotations to the plaintiff. This refusal they justify because the plaintiff is not engaged in honest business, but either "buckets" its customers' orders or transmits those orders to "bucket-shops" or both. The refusal arises from the defendants' desire to promote honest dealing in cotton. The counterclaim which is incorporated with the answer alleges that the plaintiff, not being able to get the quotations from the defendants either "purloins" the quotations from the defendants or gets them from one who does. When received it uses them for the purpose of "bucketing" orders or enabling "bucket-shops" to do so elsewhere. It asks an injunction against the plaintiff's continuation of this practice.

HENRY W. TAFT and HENRY S. ROBBINS for the motion.

JOHN M. COLEMAN opposed.

LEARNED HAND, *D. J.*: Under Equity Rule 30 there would concededly be no objection to the counterclaim if substantive jurisdiction existed. However, there is not the necessary diversity of citizenship between the plaintiff and the defendants and therefore the counterclaim will lie only if ancillary to the main controversy, the Rule being incapable of extending the constitutional jurisdiction of the District Court. The question therefore is this: Is it necessary to a complete disposition of the subject matter of the bill and to the protection of the rights involved, if the defendants are correct that the counterclaim should be entertained? This is the result of the cases, Stillman *v.* Combe, 197 U. S. 436; Raphael *v.* Trask, 194 U. S. 272; Cleveland etc. Co. *v.* Galien etc. Co., 243 Fed. R. 405, 407; Hoag *v.* Hoag, 107 Fed. R. 807, affirmed 154 Fed. R. 1003, (C. C. A. 2). The same reasoning lies at the basis of the common rule that when a court

has custody of a res, it will entertain all controversies touching claims upon it. The case turns upon an analysis of the pleadings with an eye to this principle.

The bill rests upon a tort, the refusal of the defendants to furnish the quotations to the plaintiff in pursuance of an unlawful agreement to suppress competition. The right of the defendants to withhold its quotations for other reasons is necessarily conceded, but it has no right to make its refusal a step in a scheme to monopolize the business of dealing in cotton. The answer admits the refusal but denies that it is a step in any such agreement. It asserts the defendants' right to withhold the quotations from this plaintiff because of other reasons.

Thus if the defendants succeed, the decree will either expressly or by implication declare that the defendants have the right to withhold the quotations and that the plaintiff has no right to receive them. On the assumption that the defendants will succeed, the counterclaim asks that this right be protected from the plaintiff's tort of "purloining" the quotations from the defendants' customers. The counterclaim goes upon the legal hypothesis that when the defendants have given the quotations to a customer under agreement that he shall use them only for himself, it is a tort for another to use them in his own business. Whether or not they be right is not for the moment the question, but only whether that relief demanded in the counterclaim will be ancillary to a complete disposition of the controversy in the bill.

It appears to me that it is. The defendants' whole defensive pleading is that they have the right to refuse the quotations, and that if they can establish it they should be immune in its enjoyment from unlawful attack by the plaintiff. The decree on the bill will establish their right against any attack by suit; that on the counterclaim against attack in pais. There is no reason, if the defendants establish their right by the decree, why

the plaintiff should not be forbidden from impairing the value of the decree by tortious interference. A decree under the counterclaim would do no more than secure to the defendant the complete enjoyment of a decree on the bill. It is in every sense ancillary to a complete disposition of the original controversy. Therefore, it is not necessary that there should be any independent Federal jurisdiction.

Thus the question arises on the merits. The defendants' affidavits show reason to assume that the plaintiff has been copying, or causing to be copied, the quotations from blackboards of the defendants' customers, and these affidavits are unanswered. If so, the cases support the defendants in their position; Board of Trade *v.* Christie Grain & Stock Co., 198 U. S. 236; M'Dermott Com. Co. *v.* Board of Trade, 146 Fed. R. 961, (C. C. A. 8); Board of Trade *v.* Price, 213 Fed. R. 336, (C. C. A. 8).

Therefore the defendants are entitled on this showing to an injunction forbidding the plaintiff from taking their quotations for distribution among its customers. This protects the status quo until after hearing it can be determined whether the defendants are engaged in an unlawful conspiracy.

Motion granted.

March 17, 1923.

LEARNED HAND,
D. J.

United States Circuit Court of Appeals

For the Second Circuit

FRANK MOORE, President of the Odd-Lot Cotton Exchange of New York,
Complainant,
against
THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH CO., and THE GOLD & STOCK TELEGRAPH CO.,
Defendants-Appellees,
FRANK MOORE, President of the Odd-Lot Cotton Exchange of New York,
Appellant.

Before:

ROGERS, MANTON and MAYER,
Circuit Judges.

CADWALADER, WICKERSHAM & TAFT,
For Appellee, New York Cotton Exchange;
HENRY W. TAFT,
HENRY S. ROBBINS,
GEORGE COGGILL,
of Counsel.

FRANCIS R. STARK,
For Appellees, The Western Union Telegraph Company and the Gold & Stock Telegraph Company.

JOHN M. COLEMAN,
For Appellant;
OSCAR B. BERGSTROM,
of Counsel.

This cause comes here on appeal from the United States District Court for the Southern District of New York.

The Odd-Lot Cotton Exchange, for whose benefit and that of its members this action was brought is an unincorporated association organized and operating under the laws of the State of New York. Its President is authorized by the laws of that State to bring suits in his own name on its and its members behalf. It has a membership of 100 or more and maintains an Exchange in the City of New York wherein its members buy and sell cotton for future delivery without limit as to quantity, except that no lot bought or sold shall be less than 10 bales, nor more than 100 bales. It is otherwise unlimited as to the quantity dealt in.

The New York Cotton Exchange is a corporation created by special legislative enactment of the State of New York. It has a membership of more than 400 and maintains an Exchange in the City of New York for the purchase, sale and exchange of cotton, and to facilitate dealings and transactions in that commodity, and to diffuse information as to prices, quotations and such other matters as relate to the trade and business of dealing in said commodity. It is unlimited as to the quantity of cotton dealt in except that no lot shall be less than 100 bales.

The Western Union Telegraph Company is also a New York corporation and it has its principal office in the City of New York. It is a public service corporation engaged in interstate commerce by transmitting messages by means of telegraph and cable wires between the various States and Territories of the United States, and between such States and Territories and foreign countries.

The Gold & Stock Telegraph Company is also a New York corporation and it likewise has its principal office in the City of New York. It also is engaged in interstate commerce and in disseminating market news and the continuous and instant quotations of cotton prices by means of ticker service located in Exchanges and Brokerage Houses and with cotton dealers throughout the United States.

This suit was brought for a violation of the Anti-Trust Laws of the United States.

It is alleged that the Odd-Lot Cotton Exchange opened its Exchange in New York City in August, 1922. And that in order to serve promptly and efficiently its members, brokers and customers it is necessary that it have what is known as a continuous ticker service owned and operated by defendants, The Western Union Telegraph Co. and the Gold & Stock Telegraph Co., and in order to procure same, complainant made application, as is required by the said two companies for said ticker service, said application being dated on or about July 1, 1922, and being the printed application required by defendants to be signed by all applicants for their continuous quotations as set forth in the contract between the New York Cotton Exchange and the Western Union Telegraph Company. In making its application it alleges that it was then able, willing and offered to pay whatever charges might be made and exacted therefor and to comply with all requirements of defendants, and is now ready, able and willing and offers to pay said charges, and to comply with all requirements of defendants. That at the time when it made its application to the Manager of the Western Union Telegraph Company its representative was informed that said application could not be granted, except upon the express consent of the New York Cotton Exchange. That since the making of said application, the said Western Union Telegraph Company and the Gold & Stock Telegraph Company have failed and refused to install a ticker for the use of complainant giving continuous cotton quotations, as called for in the application, and the New York Cotton Exchange has failed and refused to give its consent to the installation of said ticker service for continuous cotton quotations.

The amended bill of complaint is of great length covering more than 20 printed pages. It is not necessary for present purposes to set forth its various allegations. But it is alleged that by reason of various matters which

are set forth the "New York Cotton Exchange can and does influence and control all dealing, trading and commerce in cotton in the United States and to a large extent in foreign countries and therefore has thereby monopolized the cotton commerce in the United States, and that the free competitive flow of interstate commerce in such product is hampered, restrained and monopolized by the said defendants."

It is also alleged that "the New York Cotton Exchange is a monopoly, having complete domination and control of the cotton market for the purchase and sale for future delivery, as hereinbefore alleged; that it has complete control over the receipt and dissemination of the market quotations from foreign markets, and of the establishment and dissemination of the quotations in the City of New York, and of the manner, and to whom, same may be disseminated from the City of New York and to other Exchanges in the United States."

It is further alleged that the contract "hereinbefore alleged between the New York Cotton Exchange and the Western Union Telegraph Co. and the Gold & Stock Telegraph Co. is in restraint of trade and commerce among the several States, and was made and entered into pursuant to a conspiracy on the part of the New York Cotton Exchange and its members, constituting said exchange, in restraint of trade and commerce among the States."

It is further alleged that the "contract between the New York Cotton Exchange and the Western Union Telegraph Company and the Gold & Stock Telegraph Company, and the refusal of the New York Cotton Exchange to allow the Odd-Lot Cotton Exchange of New York to install a cotton ticker, and have the continuous cotton quotations, while allowing same to its competitors as hereinbefore alleged, constitute an unfair method of competition in commerce contrary to the acts of Congress in such cases made and provided."

The Amended Bill of Complaint asked a decree:

1. Adjudging the New York Cotton Exchange to be a monopoly.

2. That the contract existing between the defendants be cancelled and declared void, concerning the installation of tickers and the giving of continuous cotton quotations.

3. That the defendants be perpetually restrained from carrying out the said contract, and be restrained from refusing to install in the exchange of the Odd-Lot Cotton Exchange of New York a ticker for the purpose of receiving continuous cotton quotations, and from further refusing to give and disseminate to the Odd-Lot Cotton Exchange of New York, and its members, the continuous cotton quotations, the same as is furnished to and disseminated by the New York Cotton Exchange, through the said two telegraph companies, defendants, to other exchanges, individuals, corporations and brokers.

4. That the New York Cotton Exchange, its agents, servants, officers, attorneys and legal representatives, be further enjoined from in any manner discriminating against the Odd-Lot Cotton Exchange of New York, or any of the members thereof, and that it be enjoined from instructing its members not to deal with the members of the Odd-Lot Cotton Exchange of New York, and from refusing to allow its said members to so deal, and from refusing to allow its members to furnish to the members of the Odd-Lot Cotton Exchange, with whom they deal, the cotton quotations, continuous and otherwise, as may be requested from time to time by the members of the Odd-Lot Cotton Exchange for their use in their transactions with members of the New York Cotton Exchange.

The defendants in their answers admitted that they have refused to install a ticker in complainant's Exchange to supply it with continuous quotations. They also admit that they have entered into a contract by which the Western Union Telegraph Company is allowed to furnish the quotations of the New York Cotton Exchange to anyone of whom said Exchange approves but deny that the purpose or effect of the contract is to restrain trade or commerce or prevent competition. The New York Cotton Exchange also alleges that when it

received the application of the complainant for a ticker it made a careful investigation of the character and purposes of appellant and of its members and found that it had been organized to succeed the American Cotton Exchange; that many of the active members of the appellant Exchange had been active members of the American Cotton Exchange, which had been convicted in the Supreme Court of the State of New York of conducting a bucket shop under Sections 390 and 393 of the Penal Law; that the Odd-Lot Exchange was organized for the purpose of permitting its members to conduct bucket shops under the guise of being members of an Exchange; that for this reason the New York Cotton Exchange refused to permit its quotations to be furnished to appellant and for the further reason that there is no commercial necessity or reason for the existence of a cotton exchange such as appellant's, whereon contracts for the future delivery of cotton in less than 100-bale lots are made and that such an exchange is conducive to improper speculation by persons of small means and inadequate knowledge.

The New York Cotton Exchange also asserted in its answer that it had the legal right to safeguard its quotations and to refuse to give them to any person who, in its opinion, would not safeguard them or would misuse them or give them to others who would use them for the purpose of promoting bucket shops or improper speculation, and that, upon the question whether any applicant for the quotations desired them for an improper purpose, the judgment of the New York Cotton Exchange was final and not subject to judicial review.

All of the defendants set up as a defense and counterclaim in their answers that, although the complainant had been refused permission to use the continuous quotations of the New York Cotton Exchange, it was either purloining the quotations of the defendants or receiving them from some person who is purloining them, and is giving the same to its members, who in turn are distributing them over telegraph wires to many offices in the

Southern States, wherein bucket shops are conducted, and wherein said quotations are displayed on blackboards for the purpose of promoting the conduct of said bucket shops, and that the unauthorized receipt and use of said quotations by said complainant and its members is calculated to and in time will, if not entirely stopped, seriously impair the value of the defendants' quotations and ultimately entirely defeat the efforts of the defendants to prevent the use of such quotations in bucket shops as a basis of illegal bets, and will also materially impair the right of the defendants to derive a revenue from the distribution of the quotations.

The defendants prayed that an injunction might issue restraining the Odd-Lot Cotton Exchange, its officers, agents, employees and servants from receiving, using, selling, or distributing, directly or indirectly, the quotations of the New York Cotton Exchange, or any of them, and from having, maintaining or permitting any telegraph or other wire running into or through its office or exchange, over which said quotations, or any of them, are passing, and from aiding, abetting or assisting, directly or indirectly, any member of the Odd-Lot Cotton Exchange, or any other person, firm or corporation, in the City of New York, in selling or distributing said quotations or any of them, until it, he or they shall have first lawfully acquired the right to receive said quotations, either by contract from the New York Cotton Exchange or, with its consent and approval, from one of the telegraph companies authorized by said New York Cotton Exchange to distribute such quotations.

After answer the complainant moved the Court for a preliminary injunction restraining the defendants from refusing to furnish to it and its members the continuous cotton quotations of the New York Cotton Exchange. The defendants also moved for a preliminary injunction enjoining the complainant.

The motions for the injunctions were heard on the bill, answers and affidavits.

The District Court denied the complainant's motion for an injunction, and granted the motion of the defendants upon the defendants filing a bond in the sum of $30,000 conditioned upon the payment of such costs and damages to the complainant as might be suffered by him if he be found to have been wrongfully enjoined. From the order, entered on March 26, 1923, denying the complainant's motion for an injunction and granting the motion of the defendants for an injunction against the complainant, the latter appealed to this Court.

ROGERS, Circuit Judge (after stating the above facts): It appears that the New York Cotton Exchange provides an Exchange Room in the City of New York where its members meet and make contracts for themselves or as brokers for customers, for the purchase and sale of cotton for future deliveries. Their transactions aggregate many million bales of cotton annually. The contracts are made on the Exchange between 10 A. M. and 3 P. M. by open *viva voce* bidding. It claims that the knowledge of the prices upon which these contracts are based constitutes a peculiar kind of property and that their value depends on the right to confine the distribution of the quotations to such telegraph companies as will contract with the Exchange therefor and to such customers as will agree with the telegraph companies and the Exchange not to furnish them to others. The Western Union Telegraph Company pays to the Exchange annually a considerable sum of money for the privilege of receiving these quotations and distributing them to those customers of whom the Exchange approves. If any person can promptly acquire these quotations, surreptitiously, and without paying therefor and can give them out to others, the telegraph companies would be put at a disadvantage in competing with such persons and would no longer be willing to pay to New York Cotton Exchange the annual sum now paid to it for the privilege of receiving these quotations.

The complainant does not challenge the claim of the Cotton Exchange that it has a property right in the

quotations. Indeed, its right to come into equity for the relief which it seeks assumes that the quotations constitute a species of property. It is that upon which the jurisdiction of equity depends, as courts of equity are concerned only in the protection of property rights. And the right to acquire property is as much entitled to protection as the right to protect property already acquired. *International News Service* v. *The Associated Press*, 248 U. S., 215, 236. And in *Board of Trade* v. *Christie Grain and Stock Co.*, 198 U. S., 236, 250, the Supreme Court held that quotations of prices or dealings upon a board of trade communicated on confidential terms to numerous persons under a contract not to make them public were entitled to the protection of the law. And see *Hunt* v. *New York Cotton Exchange*, 205 U. S., 322.

But all the parties to this suit are citizens of the State of New York, so that the jurisdiction of the Court in this case does not rest upon diversity of citizenship. If jurisdiction of the bill exists it must be because the acts complained of therein violate the Federal Anti-Trust Laws.

It is plain that the bill cannot be maintained under the Federal Trade Commission Act of 1914 (38 Stat., 717). That Act declares that unfair methods of competition in commerce are unlawful and the Commission is empowered to prevent persons, partnerships or corporations, with certain exceptions, from using such methods of competition. But as the only relief that Act provides is before the Federal Trade Commission, it affords no support whatever for the bill now before us.

The Sherman Act to protect trade and commerce against unlawful restraints and monopolies, being the Act of July 2, 1890, invested the District Courts with jurisdiction to protect trade and commerce against unlawful restraints and monopolies. That Act made it the duty of the several district attorneys in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain violations of the Act. It did not authorize a suit

by an individual or corporation for injunctive relief in a Federal Court. It affords no support, therefore, for this suit.

But the Act of October 15, 1914, known as the Clayton Act, in Section 16, provided that any person, firm, corporation, or association, shall be entitled to sue for and have injuctive relief in any court of the United States having jurisdiction over the parties against threatened loss or damage by a violation of the anti-trust laws when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings. 38 St., Part 2, ch. 323, p. 737. And it has been held in *General Investment Company* v *Lake Shore & Michigan Southern Railway Company*, 260 U. S., 261, 287, that the right to sue thus given is to be exercised only in "a court of the United States." It cannot be asserted in a State court.

The Sherman Anti-Trust Act provides as follows:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *
>
> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * * shall be deemed guilty of a misdemeanor * * * *." 26 Stat., 209.

So that the question which we have to determine is whether the contract which the New York Cotton Exchange has made with the Western Union Telegraph Company, respecting the quotations on the Exchange, is a contract in restraint of trade or commerce, or whether there is shown on the part of the defendants or any of them a monopoly or an attempt to monopolize any part of interstate commerce.

The Supreme Court in *Standard Oil Company* v. *United States*, 221 U. S., 1, and in *United States* v. *American Tobacco Co.*, 221 U. S., 106, construed the Anti-Trust Act as prohibiting only contracts or acts which were *unreasonably* restrictive of competitive *conditions*, and in the case last cited the Court quoted approvingly from the opinion in the *Joint Traffic* case, 171 U. S., 505, 568, the statement that "The Act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract, among business men that could not be said to have, indirectly or remotely, some bearing on interstate commerce, and possibly to restrain it."

As construed by the Supreme Court in the cases cited and in those about to be cited, the Sherman Act is not construed as forbidding or restraining the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. And see *United States* v. *Union Pacific R. R. Co.*, 226 U. S., 61; *United States* v. *Reading Co.*, 226 U. S., 324; *Nash* v. *United States*, 229 U. S., 373; *Eastern States Lumber Association* v. *United States*, 234 U. S., 600.

The cases disclose that where the facts clearly show that the purpose of a contract is not to regulate, obstruct or restrain interstate commerce, but that the object is properly and fairly to regulate the transaction of the business in which the parties to it are engaged, the agreement will be upheld as not within the Statute. The contract is good if "it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object." *Anderson* v. *United States*, 171 U. S., 604.

And the record in this case discloses that the intention and purpose of the parties in making the contract which the complainant attacks in this suit was a proper

and legitimate one. Prior to 1903 the telegraph companies were at liberty to gather quotations in the Exchange Room and to sell them to anyone desiring them. The only motive of the telegraph companies was profit, and the more customers the greater the profit. But it is said this resulted in the creation of many bucket shops throughout the country, where the quotations were posted on a blackboard and the keeper of the bucket shop accepted all offers of persons resorting to his place to bet on the fluctuations of prices as indicated by such quotations, these alleged trades or bets being opened at the last price on the blackboard and being closed when the blackboard price reached a point where the customer's margins became exhausted, or where prior thereto the customer desired to close his trade at the last named price thus essential to the conduct of such business. The use by these institutions throughout the country of these quotations necessarily brought the New York Cotton Exchange and other regular exchanges into discredit with the public, it being supposed, from the presence of these quotations, that these bucket shops were in some way connected with these exchanges. To correct this condition and suppress these gambling places, so far as they were operating on its quotations, the New York Cotton Exchange made a contract in 1903, requiring the telegraph companies—in order to acquire the quotations—to enter into a contract with the Exchange substantially in the form of the contract herein involved. The purpose was, so it is said, to confine the distribution of the quotations to those desiring them for lawful purposes, and to thereby exclude their being given to persons who would not carefully safeguard them and confine them to their own offices. To the success of this purpose, it was essential that the quotations should be kept, not only from the bucket shops themselves, but from all persons who should acquire them for the purpose of surreptitiously re-transmitting them to bucket shops. To this end, the contract provided for a written application to be signed by each person desiring the quotations, in

which he should agree with the Exchange and the telegraph companies, not only that the applicant would not himself use the quotations in conducting a bucket shop, but that he would confine the quotations to his own office, and not permit them to be communicated therefrom.

This plan to prevent the misuse of quotations necessarily imposed, either upon the Exchange or the distributing telegraph company, the burden of determining the character and purpose of each applicant for the quotations. The telegraph company had no pecuniary interest in restricting the number of its customers for quotations. The only person having a real interest in preventing the misuse of the quotations was the Exchange itself, and the contract conferred upon the Exchange the right and duty to pass upon the character and purpose of each applicant and make its decision final by providing that the telegraph company should not furnish the quotations to anyone whose application was disapproved by the Exchange.

It cannot be said that the contract involved was entered into for the purpose of restraining trade or of creating a monopoly. It appears to us that its purpose was that of properly regulating the transaction of the New York Cotton Exchange and of preventing the misuse of its quotations. It is not a contract in restraint of trade or commerce within the meaning of Section 1 of the Sherman Act as construed by the Supreme Court. Neither is it an attempt to monopolize trade or commerce among the several States within the meaning of Section 2 of the Sherman Act.

The New York Cotton Exchange has the property right in the quotations which it collects. As such owner the Exchange is under no legal duty to sell its quotations to any particular person nor to all because it sells to some. These quotations relate solely to the business of the Exchange, which is under no obligation to communicate them, and the telegraph company, as its agent, communicates them to those persons to whom the Exchange permits the communication to be made. In this we see no illegality. *Whitwell* v. *Continental Tobacco*

Co., 125 Fed., 454; *Matter of Renville*, 46 App. Div. (N. Y.), 37. So far as the contract limits the right of the telegraph company to communicate the quotations to such persons as the Exchange approves we are unable to distinguish this case from that of *Board of Trade* v. *Christie Company*, 198 U. S., 236. That case involved a contract made by the Chicago Board of Trade with the telegraph companies for the distribution of its quotations. The Supreme Court held that contracts under which the Board of Trade furnished the telegraph companies with its quotations, on condition that they would only be distributed to persons in contractual relations with, and approved by the Board, and not to what are known as bucket shops, were not void as being in restraint of trade, either at common law or under the Anti-Trust Act. The Court held the Board of Trade was entitled to an injunction enjoining the defendants from using and distributing the continuous quotations of prices on sales of grain and provisions for future delivery, and which the defendant could not obtain except through a known breach of the confidential terms on which the plaintiff communicated them.

The complainant asks a mandatory injunction compelling the defendants to furnish to it the continuous quotations of prices of contracts for the future delivery of cotton made on the New York Cotton Exchange. The transactions in which the latter Exchange is engaged and in which the complainant itself is engaged constitute, it is claimed, interstate commerce. The bill alleges that the purchases and sales made on the Exchanges "constitute a large and important part of the Interstate Commerce as between said cotton growing States and other States, including the State of New York. That in addition to the said interstate sales and purchase as alleged for delivery from said States, through and into many States of the United States, and into the State of New York, the said Interstate Commerce involves the interstate shipments and transportation of said commodity, through and from said cotton growing States, to the

State of New York, whence it is consigned and shipped to other cotton markets of the United States and Foreign Countries for manufacture." The contracts made on the New York Cotton Exchange are made in the Board Room of the Exchange in the City of New York and they provide that the cotton is deliverable from licensed warehouses in the Port of New York. Performance of the contract is made by the delivery of negotiable warehouse receipts issued by licensed warehouses in New York. There is no obligation to make delivery at any place except in the Port of New York. Such a transaction is local in its character and does not involve interstate commerce. The decisions of the Supreme Court make this clear. In *Hopkins* v. *United States*, 171 U. S., 578, it was held that the Kansas City Live Stock Exchange was not engaged in interstate commerce under the following circumstances: It received consignments of cattle from owners in other States upon an understanding that they should be sold and the net amount realized on the sale returned to the owners. In its opinion the court said:

> " * * * it is immaterial over how many States the defendants may themselves or by their agents travel in order to thereby secure the business. They do not purchase the cattle themselves; they do not transport them. They receive them at Kansas City, and the complaint made is in regard to the agreements for charges for the services at that point in selling the cattle for the owner. Thus everything at last centres at the market at Kansas City, and the charges are for services there, and there only, performed.
>
> The selling of an article at its destination, which has been sent from another State, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such service is not, therefore, a combination in restrain of that

> trade or commerce. Granting that the cattle themselves, because coming from another State, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade."

There are other decisions of that court which assert a like doctrine. See *Anderson* v. *United States*, 171 U. S., 604; *Ware & Leland* v. *Mobile County*, 209 U. S., 405, 413; *Hill* v. *Wallace*, 259 U. S., 44.

The complainant relies upon *Board of Trade of the City of Chicago* v. *Olsen*, 262 U. S., 1. That case involved an appeal from a decree which dismissed a bill in equity brought by the Board of Trade to enjoin certain United States officials from taking steps to enforce the Act of Congress of September 21, 1922, known as the Grain Futures Act, the constitutionality of which Act was directly involved. That case is not distinguishable in principle from that of *Stafford* v. *Wallace*, 258 U. S., 495, which involved the constitutionality of the Packers and Stockyards Act of 1921. In neither case has the court overruled the cases heretofore cited in this opinion in which sales on the Exchanges were regarded as transactions in intrastate commerce and not in interstate commerce. It sustained the right of Congress to regulate in the one case the boards of trade and in the other the various stockyards of the country as great national public utilities. The Acts involved assumed that the corporations regulated by the Acts conducted a business affected by a public use of a national character and that they were therefore subject to national regulation. These cases show that the power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. We find another illustration of the principle in the

Transportation Act of 1920, which authorizes supervision by the Interstate Commerce Commission, of intrastate commerce where it is so carried on as to favor persons or localities in intrastate commerce as against those in interstate commerce. See *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S., 563; *The Minnesota Rate Cases*, 230 U. S., 352, 399.

But we find nothing in *Stafford* v. *Wallace (supra)* or in *Chicago Board of Trade* v. *Olsen*, or in any decision of the Supreme Court which supports the complainant's contention that the New York Cotton Exchange is engaged in interstate commerce. Neither are we cited to any Act of Congress which entitles the complainant to maintain its bill. And we conclude that the bill itself must be dismissed.

Equity Rule 30 (198 Fed., xxvi) permits the defendant in his answer to "state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may without cross-bill set out any set-off or counterclaim against the plaintiff which might be the subject of an independant suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims." Under this rule if defendant has an independent cause of action in equity against the plaintiff he may counterclaim it. And a counterclaim so pleaded being in effect a "cross-suit" is not affected by a decree dismissing the bill on the merits. *Buffalo Specialty Co.* v. *Vancleef*, 217 Fed., 91.

The counterclaim sets up a cause of action within the jurisdiction of the District Court as a court of equity and within its jurisdiction as a federal court. On the dismissal of the complainant's bill the counterclaim in this suit is entitled to be treated as an original bill within the rule laid down by this court in *Vidal* v. *South American Securities Co.*, 276 Fed., 855, 875, and the au-

thorities there cited. It has frequently been said to be the general rule that the dismissal of the original bill carries with it a cross-bill. *United States* v. *California, &c. Land Co.*, 192 U. S., 355; *Dows* v. *Chicago*, 11 Wall., 108; *Cross* v. *DeValle*, 1 Wall., 1; *Ulman* v. *Iaeger's Adm'r.*, 155 Fed., 1011; *Markell* v. *Kasson*, 31 Fed., 104; *Glos* v. *People*, 259 Ill., 332; *Bell* v. *McLaughlin*, 183 Ala., 548. But it is generally recognized that the dismissal of the original bill does not necessarily carry with it a cross-bill. Whether it has that effect depends upon whether the cross-bill is defensive merely or sets up new facts and prays for affirmative relief against the plaintiffs in the original bill and shows grounds for equitable relief which may uphold the jurisdiction of the court independent of the original bill (21 C. J., 514).

Where, as here, the bill and the counterclaim relate to the same subject-matter, it is quite immaterial that in the case of a cross-bill, and the same principle applies to a counterclaim, the parties thereto are citizens of the same State, and no diversity of citizenship exists. The cross-bill and the original suit are but one cause, and jurisdiction of the latter includes the former. If the court has jurisdiction of the original bill it has jurisdiction of the cross-bill without reference to the citizenship of the parties, and the cross-bill need not disclose grounds of federal jurisdiction. *Shields* v. *Barrow*, 17 How., 130; *Freeman* v. *Howe*, 24 How., 450, 460; *Cross* v. *DeValle*, 1 Wall., 1, 14; *Railroad Companies* v. *Chamberlain*, 6 Wall., 748; *Krippendorf* v. *Hyde*, 110 U. S., 276; *Phelps* v. *Oaks*, 117 U. S., 236; *Hogg* v. *Hoag*, 107 Fed., 807, aff'd 154 Fed., 1003; *Portland Wood Pipe Co.* v. *Slick Bros. Const. Co.*, 222 Fed., 528; *Cleveland Engineering Co.* v. *Galion Dynamic Motor Truck Co.*, 243 Fed., 405. Jurisdiction having attached on the allegations contained in the bill the court may, upon the hearing, dismiss the bill and grant relief under the counterclaim, although the counterclaim could not have been sustained as an original bill for lack of jurisdiction.

The counterclaim does not bring in any new subject-matter. It relates to the same contract upon which the amended bill is based and to the quotations of the New York Cotton Exchange which the complainant seeks to obtain by having the contract declared illegal. The counterclaim does not introduce new and distinct matters into the litigation. The subject-matter is the same in both.

We are thus brought to a consideration of the counterclaim on the merits. The defendant charged on information and belief the fact to be that the plaintiff either itself purloined the quotations of the defendant Exchange, or that it received them from some person who is purloining them and giving them to its members. When the equity of a bill rests upon the existence of a particular fact it is necessary that that fact should be clearly alleged. And the allegations of a bill seeking an injunction must be specific. Allegations made upon information and belief are, as a rule, insufficient. In any case where the matters do not lie within the personal knowledge of the plaintiff he may allege those matters upon information and belief; but the statements of the bill as to such matters should be corroborated as far as possible by the affidavits of persons having personal knowledge. Street's Equity Practice, vol. 3, p. 1351, sec. 2307. *United States* v. *Butler,* 278 Fed., 677; *In re United States Wireless Telegraph Co.,* 201 Fed., 445; *Leavenworth* v. *Pepper,* 32 Fed., 718; *Brooks* v. *O'Hara,* 8 Fed., 529.

In the instant case, while the allegations of the counterclaim as to the purloining of the quotations, by the complainant, or as to its receiving them from someone who is purloining them, are upon information and belief, they are sufficiently supported by the affidavits which were presented to the Court in support of the counterclaim. Moreover, while the complainant in its reply denied that it is itself purloining the quotations, it does not deny in any pleading or affidavit that it is receiving them. The right of the New York Cotton Exchange to

protect by injunction its right in the quotations which it collects is, under the circumstances disclosed, indisputable. As the Court said in the similar case of *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S., 236, 250:

> "* * * the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's. Compare *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S., 239, 249, 250. The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach."

See *Exchange Telegraph Co.* v. *Gregory & Co.* (1896), 1 Q. B. D., 147; *F. W. Dodge Co.* v. *Construction Information Co.*, 183 Mass., 62; *Board of Trade* v *C. B. Thomson Commission Co.*, 103 Fed., 902; *Board of Trade* v. *Hadden-Krull Co.*, 109 Fed., 705; *National Tel. News Co.* v. *Western Union Tel. Co.*, 119 Fed., 294; *Illinois Commission Co.* v. *Cleveland Tel. Co.*, 119 Fed., 301; *Board of Trade* v. *McDearmott Commission Co.*, 143 Fed., 188, 190; *McDearmott Commission Co.* v. *Board of Trade*, 146 Fed., 961, 962; *Board of Trade* v. *Cella Commission Co.*, 145 Fed., 28; *Board of Trade* v. *Price*, 213 Fed., 336.

The order appealed from, which denied the complainant's motion and granted the defendant's for a preliminary injunction, is affirmed. And the Court below is directed to dismiss the complainant's amended bill.

I, HENRY W. TAFT, attorney and counselor at law duly admitted to practice in this Court, do hereby certify that I have examined the foregoing papers in opposition to complainant-appellant's motion for a stay and that the motion is without merit and ought, therefore, to be denied.

Dated, February 20th, 1925.

HENRY W. TAFT,
Counsel for Appellees.